Office-Supreme Court, U.S.
FILED
MAR 22 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1961

No. 683

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

GEORGE EZEKIEL,

Petitioner,

against

VOLUSIA STEAMSHIP CO. and SUWANEE STEAMSHIP CO.,

Respondents.

GEORGE RICHTER,

Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES, INC. and S.S. MICHAEL, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

RESPONDENT STATES MARINE CORPORATION OF DELAWARE'S BRIEF IN OPPOSITION TO PETITION OF RAUL PINTO FOR WRIT OF CERTIORARI

CORYDON B. DUNHAM
Attorney for Respondent States Marine Corporation of Delaware
82 Beaver Street
New York 5, N. Y.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Preliminary Statement	2
Facts	2
Questions Presented	3
Statement I	4
Statement II	6
Statement III	6
Statement IV	7
POINT I—There is no intra-circuit conflict in the Decisions of the United States Court of Appeals, Second Circuit within the purview of the decisions of this Court which would indicate granting certiorari. The dissent of one judge in two different panels and the dissent of two judges in a panel of nine sitting in banc does not constitute intra-circuit conflict of decision inasmuch as the decisions of the panels themselves and the decisions of the judges in banc are in conformity	8
POINT II—There is no conflict in the decisions of the Court below with respect to any of the petitioners herein	12

PAGE

POINT III—The Circuit Court of Appeals did not refuse to consider plaintiff's exception 14

POINT IV—The Trial Judge's charge was so emphatic as to the "absolute liability" of the shipowner that the casual use of the words momentary and transient was of no significance 16

Conclusion 19

Appendix:

Exhibit A—Judgment of Court of Appeals ..... App. 1

Exhibit B—Denial of Petition for Rehearing by Court of Appeals ..... App. 3

Exhibit C—Denial of Petition for Rehearing in Banc by Court of Appeals .. App. 4

Exhibit D—Discussion of Cases Wherein the Second Circuit Court of Appeals and District Judges of the United States District Court for the Southern District of New York Have Not Completely Nullified the Rights of Petitioner Pinto and Other Seamen ..... App. 5

Exhibit E—Testimony Proving That the Step Involved in the Case Was Not "Worn and Slick" ..... App. 7

Table of Cases Cited

	Page
Blier v. United States Line Company, 286 F. 2d 920	App. 5
Buck v. United States, 122 F. Supp. 25, aff'd. 220 F. 2d 165	App. 6
Campbell v. Tidewater Associated Oil Co., 141 F. Supp. 431	App. 6
Dickinson v. Petroleum Conversion Corp., 338 U. S. 507, 70 S. Ct. 322	9, 11
Dixon v. United States, 219 F. 2d 10	App. 5
John Hancock Mutual Ins. Co. v. Bartels, 308 U. S. 180	9
Maggio v. Zeitz, 333 U. S. 56	11
Mitchell v. Trawler Racer, Inc., 362 U. S. 539	4, 17
Poignant v. United States (2nd Cir.), 225 F. 2d 395	17, App. 5
Rogers v. Missouri-Pacific RR Co., 352 U. S. 500	9, 10
United States v. Atkinson, 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555	15

Other Authorities Cited

Merchant Marine Act, Section 33, 46 U.S.C.A. 688	3
Chap. 646, Stat. 871	9
United States Circuit Court of Appeals Rules, Section 25	9

Supreme Court of the United States

OCTOBER TERM 1961

No.

RAUL PINTO,

Petitioner,

—against—

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

GEORGE HOOPER,

Petitioner,

—against—

TERMINAL STEAMSHIP COMPANY,

Respondent.

GEORGE EZEKIEL,

Petitioner,

—against—

VOLUSIA STEAMSHIP CO., and SUWANEE STEAMSHIP CO.,

Respondents.

GEORGE RICHTER,

Petitioner,

—against—

MATHIASEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J., her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

RESPONDENT STATES MARINE CORPORATION OF DELAWARE'S BRIEF IN OPPOSITION TO PETITION OF RAUL PINTO FOR WRIT OF CERTIORARI

Opinions Below

By opinion decided October 26, 1961, the Court below affirmed judgment of the District Court against petitioner, Raul Pinto, one of the petitioners, after a jury verdict in favor of this respondent in the District Court in the Southern District of New York. The final opinion as amended by the Court on its own motion by an order of November 1, 1961, is reported in full in 296 F.2d 1.

By Per Curiam decision decided November 28, 1961, a panel of nine judges of the Court below in banc denied a petition of the said petitioner for a rehearing. A copy of said opinion is attached hereto and marked Exhibit "C" in the Appendix.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Preliminary Statement

Respondent States Marine Corporation of Delaware is involved only in the *Raul Pinto* case. *Pinto* resulted in a jury verdict for the defendant. This fact sets it aside from the *Hooper*, *Ezekiel* and *Richter* cases which resulted in dismissals by the Court alone.

Excerpts from Facts in *Raul Pinto* Case

The S S "Clovis Victory", the vessel involved in this case, was owned by the United States on De-

ember 11, 1957. A shipyard had built the vessel for the United States.

United States government experts, engineers and designers prescribed specifications for all the details as to the construction of the vessel, including the ladders in the engine room. R. 150-160.

The testimony indicated that the steps in the ladder was built according to specifications, which dictated that the steps of the ladder were to be accident proof. The steps was not slick and worn. The vessel was practically new. When the government contracted with the defendant to operate the vessel during the voyage when petitioner Pinto was hurt, it had been used very little. The steps had no solid surface for accumulation of grease or oil to cling to. Upright, thin, narrow strips were used for constructing the steps.

Testimony of witnesses indicating the above will be found in Record filed by petitioner at pages 37, 46, 183, 211, 138, 139.

Questions Presented by Respondent, States Marine Corporation of Delaware

In the light of the verdict in favor of defendant, affirmance thereof by the Court of Appeals, and denial of a petition for rehearing in banc, respondent raises the following questions with respect to petitioner Pinto:

1. Is there a valid conflict in the decisions of the United States Court of Appeals, Second Circuit, of the exceptional and serious nature urged upon this

warrants certiorari? With respect to facts and law the following questions apply only if the Court regards question 1 in the affirmative.

(2) Where the trial judge charged the jury that a shipowner's duty to supply a seaworthy vessel is absolute and non-delegable, several times with respect to physical structure, appurtenances, and an adequate competent crew and officers, regardless of the shipowner's fault, regardless of the exercise of diligence and reasonable care, and regardless of notice, does his passing reference to a momentary defect, coupled with instruction of reasonable fitness for use as the essential test, rather than absolute perfection, render the charge, when read in its entirety, contrary to the later decision of this Court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539?

STATEMENT I

Raul Pinto, an able-bodied seaman of the S.S. "Clovis Victory", brought this action to recover damages for personal injuries against States Marine Corporation of Delaware. The action was premised on alleged negligence and alleged unseaworthiness. The S.S. "Clovis Victory", a government-owned vessel, was operated by the defendant. The complaint alleged, and defendant admitted, that plaintiff was employed by the defendant.

The Third Mate of the vessel carried a sixty pound blinker light down the stairs of the engine room for repairs. No block and fall was used.

(R. 382)

"Q. I see. Now, can you help us any way

with respect to this angle of using a block and fall? You are a mate. Tell us what is there. A. Well, with the type of object in use——"

Q. What? A. With the type of object that is in question here, I would deem it rather foolish to attempt to use a block and tackle. The object, the weight of it, as I said before, I did the job myself, and in my estimation, I didn't think it was necessary.

Q. Even the hook on this block and fall, does that weigh more than this object? A. Well, they do have a rig in the engine room which is for heavy machinery.

Cross-examination by Mr. Rayner:

(387)

Q. Would you consider a 75 pound light—when I say light, I mean a signal light, equipment—a heavy or light object? A. Well, having handled it myself, as I previously testified, I didn't consider it heavy enough to lower down with a rig."

Thereafter he directed the plaintiff and an Ordinary Seaman to carry the blinker light down the same engine room stairs for additional repairs.

Plaintiff seeks recovery under the Merchant Marine Act approved June 5, 1920, Section 33, 46 U.S.C.A. 688

Originally the case was premised on negligence and unseaworthiness. During the trial plaintiff's counsel withdrew the negligence case leaving but the issue of unseaworthiness to be decided by the jury.

There came a time when plaintiff returned to work for defendant. He severed from one of its vessels. He sought employment with Moore McCormack Lines, Inc., and after having a physical examination returned to sea as a crew member of one of its vessels.

STATEMENT II

Petitioner Pinto seeks consideration of an additional question.

Petitioner's trial counsel made it clear to the trial judge in chambers that he had no exception to the charge. The ruling of the trial judge as to an oral request was considered by the United States Court of Appeals for the Second Circuit at petitioner's request and that court ruled that the oral request was too broad.

STATEMENT III

Unwarranted and unjustified is petitioner Pinto's criticism of the decisions of the Circuit Judges of the United States Court of Appeals for the Second Circuit who do not agree in all respects with his counsel.

This petitioner's brief charges that court with erroneous and unauthorized judicial legislation and contends that rights heretofore had by petitioner Pinto have been denied him.

Unfortunately or otherwise, said petitioner, strenuously urges that the lower courts have made such decisions that all other seamen's rights have been put in jeopardy of complete nullification. His counsel

seemingly overlooks the prestige which the Second Circuit has had for many years in its interpretation of Admiralty Law.

Incidentally, more than fifty percent of the litigation in the court where the Pinto case was tried have to do with maritime matter.

The petitioners are disappointed with the Appellate Court's decision. Therefore, they bring an application which is characteristic of a class action and attempt to downgrade an Appellate Court which have been renowned throughout the nation in its interpretation of Maritime Law.

See Respondent's Appendix p. 5, wherein will be found discussion of cases which have been cited by Petitioner Pinto's counsel with approval.

STATEMENT IV

With respect to the claim of worn and slick step, appellant did not feel aggrieved in the lower court as to the charge on that phase of the case.

See Respondent's Appendix p. 7 in which there is testimony indicating that the claim of a worn and slick step was false and untrue.

POINT I

There is no intra-circuit conflict in the Decisions of the United States Court of Appeals, Second Circuit within the purview of the decisions of this Court which would indicate granting certiorari. The dissent of one judge in two different panels and the dissent of two judges in a panel of nine sitting in banc does not constitute intra-circuit conflict of decision inasmuch as the decisions of the panels themselves and the decisions of the judges in banc are in conformity.

Petitioner urges that inasmuch as: (a) Honorable Charles E. Clark, Circuit Judge, dissented with the majority of the judges' opinions in the *Ezekiel* case and (b) Honorable J. Joseph Smith, Circuit Judge, dissented with the majority opinion of the panel of judges in the *Raul Pinto* case; (c) both Honorable Charles E. Clark and Honorable J. Joseph Smith dissented with the majority of the judges' decision, denying re-hearing, in the *Raul Pinto* case panel of judges sitting in banc, that notwithstanding that each of the panels of judges majority decisions conform to the decisions of each other and to the majority decision of the panel of judges in banc, that the dissenting decisions of the two judges constituted an intra-circuit conflict. It is submitted that the contention of petitioner with respect to intra-circuit conflict cannot be sustained inasmuch as one sole dissent of a circuit judge in any case in the same circuit would entitle a litigant affected thereby to urge that an intra-circuit conflict existed. This would be so whether the judges were sitting in regular panel or in panel in banc.

According to the statutes enacted by Congress (June 25, 1948, Chap. 646 Stat. 871), and in accordance with the United States Circuit Court of Appeals Rules, Section 25, petitioner could but suggest to the lower court that he have a rehearing in banc. Once his petition was filed it was entirely discretionary with the Second Circuit as to the allowance of the relief sought.

There is no intra-circuit conflict with respect to the interpretation of seaworthiness in the second circuit as all the decisions of the panels involved in the petition conform.

Furthermore, petitioner Pinto has failed to establish an intra-circuit conflict within the ruling of the two cases cited and relied on under Point I of his brief as will be seen below.

In *Dickinson v. Petroleum, etc.*, 338 U.S. 507, this court granted a certiorari because the Court of Appeals opinion stated that their decision was against the unanimous opinion of the court as constituted but they did so in deference to a precedent established by a differently constituted court of the same circuit.

In *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, the Court of Appeals in effect overruled prior decisions of the same circuit for misinterpreting a section of the Bankruptcy Act.

Also in Point I of petitioner's brief in referring to the dissenting opinion of Mr. Justice Frankfurter in *Rogers v. Missouri Pac. R.R. Co.* 352 U.S. 500, 530-531, petitioner omits the following significant language from his quotation thereof: "* * * certiorari

jurisdiction is a jurisdiction to be exercised sparingly and only in cases of special gravity * * *" and continuing is the statement that such were generally issued in the case of "* * * conflicts between Circuit Courts of Appeals * * *", not to intra-circuit conflicts within one circuit.

In the *Rogers* case certiorari was also granted because a lower court had deprived him of his rights to a jury determination after a jury had found in his favor, a court having set aside his verdict. The evidence in his case was sufficient to support the jury's verdict.

The facts in the *Rogers* case were similar to the facts in the *Pinto* case. However, the *Pinto* case does not fall within the category of cases where a lower court has persistently deprived the litigants of their rights to a jury determination.

1. Rogers backed off a culvert.

2. Pinto backed down a ladder.

The jury awarded damages to Rogers, a workman. The jury refused to award damages to Pinto a workman.

In the Pinto case the jury rejected Pinto's falsified contention that the step in the ladder was "worn and slick" and that grease and oil had accumulated on four or five strips of metal standing upright approximately $\frac{1}{4}$" wide in a hot engine room.

The jury considered the evidence and exhibits in the Pinto case meticulously to the extent that the foreman of the jury arose from the jury box and

came down in the well of the courtroom. He was in view of the eleven other jurors.

This foreman of the jury lifted the blinker light, which was marked in evidence (R. 438).

The replica of the step involved in the litigation; the blinker light; and the photograph of the ladder taken right after the occurrence were the only exhibits called for by the jury and sent to them by an order of the trial judge (Charge of the Court, p. 21).

In *Maggio v. Zeitz*, 333 U.S. 56, another bankruptcy question on which there were decisions in the same circuit that were clearly contradictory (not the fact here) the Supreme Court pointed to the fact that the Court of Appeals felt constrained, against its better judgment, to follow its own most recent decision on the question, a situation similar to *Dickinson*, supra.

This respondent urges again, most respectfully, (a) there is no true intra-circuit conflict involving (b) extraordinary circumstances or (c) a question of such extraordinary importance that this Court must decide it.

POINT II

There is no conflict in the decisions of the Court below with respect to any of the petitioners herein.

Both courts below found in favor of the defendants in the cases of the four petitioners seeking certiorari.

The opinions in the Second Circuit Court of Appeals in each of these cases show that there is a difference in the findings by the Circuit Judges in the application of the law because of the particular facts of the cases. Despite the language of the dissenting opinions, there is nothing to show that the application of the law in these cases constitutes any genuine conflict with the decisions of the United States Supreme Court. Further, there is no genuine conflict between the Second Circuit decisions in these cases of the petitioners with other decisions of the same circuit.

This respondent also urges that there is no intra-circuit conflict between the opinions in the *Ezekiel* case and the *Pinto* case. Ezekiel neglected to wear goggles which were provided to him for use while chipping rust with a hammer.

With respect to the facts in petitioner Richter's case, there was no proof of a slippery metal shelf. United States District Judge Noonan decided the case on the facts. He ruled that no credible evidence was produced upon which Richter could recover. The Appellate Court came to the same conclusion. This does not constitute intra-circuit conflict.

It is not too unreasonable to assume that the jury in the *Pinto* case found that plaintiff used no precautions for his own safety and that he exercised poor judgment in turning around and completely facing about while engaged in descending the straight stairway while helping to carry a flinker light.

Further, the ladder which he was descending happened to be of exceedingly safe construction, of fabricated steel in accord with the designs of experts employed by the United States Government.

Although the record indicates that Pinto did not fall on the floorplate of the engine room the Court inadvertently charged as follows:

> "He slipped while in the process of shifting and fell to the floor plate of the engine room." (Charge of the Court, p. 4).

This charge was contrary to the testimony of Second Assistant Engineer Black, who was in the court room and called as a witness for the plaintiff, who testified as follows (R. 311):

> "Q. Now, what are the facts? Did you catch this man? Did you catch this man Pinto? A. Catch him?
>
> Q. As he was falling, in your arms or anything? A. No, sir.
>
> Q. You didn't? A. I didn't.
>
> Q. And did he fall on the grating and on the floor? A. He never fell any place that I could see.
>
> Q. And did you take the light away from him? A. I did.
>
> Q. But he was standing up when you saw him? A. That's right; he was standing on about the third or fourth step. I don't know.

Q. But at any time did you see his hips or his body down in contact with those steps? A. No, no.

Q. All the time when you saw his legs, was he standing up? A. Standing up.

Q. Do you know that there is any reason for having all this, what do you call this latticework? A. You could call it that, call it grating, I guess.

Q. Grating? A. Yes, lattice.

Q. Is there any reason for having it that way, that you know of? A. Well, the only reason I know would be to keep dirt, grease or anything from accumulating."

To be more specific, the Appellate Court made a decision of affirmance on the rendition of a jury properly charged on the facts proven by the defendant.

POINT III

The Circuit Court of Appeals did not refuse to consider plaintiff's exception.

Its opinion states that counsel's improperly submitted oral request was, on its merits, too broad. And, if the charge was subject to any criticism, the court doubted whether the exception was apt to raise it.

The court must have considered the exceptions of plaintiff's counsel for the opinion states that the exceptions that were made were not well taken.

As to the plaintiff's contention that the trial judge had invaded the jury's province, the Appellate Court felt that a more specific objection was needed.

This court reviewed errors in a charge in *United States v. Atkinson*, 297 U. S. 157, 159, 56 S. Ct. 391, 392, 80 L. Ed. 555.

This court indicated two grounds for reviewing errors. Obviously these grounds are well known to this court. In this connection respondent urges that there was no magnificently obvious error in the trial judge's charge in the Pinto case. The charge indicates that Guy Pinto was a "ward of the Admiralty", his interests were given unusual care. Unusual care to such an extent that three times the jury was told that plaintiff's former employer was "absolutely liable" if. So, it is suggested that there was no error which seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Although the judge had not charged in line with the *Cookingham* case, 184 F. 2d 213, plaintiff's counsel, through an inadvertence, informed the trial judge that he had so charged. Charge of Court, p. 19 [illegible]

The Appellate Court must have given due consideration to plaintiff's exceptions for the opinion states that so "experienced a judge" well knew that the Second Circuit Court of Appeals had disapproved the *Cookingham* decision in deciding the *Pennisi* case.

POINT IV

The Trial Judge's charge was so emphatic as to the "absolute liability" of the shipowner that the casual use of the words momentary and transient was of no significance.

only the mate's overall competence to the extent that the judge would [illegible] as we think he did, it was the defendant who was entitled to complain." Petitioner's Appendix p. [illegible]

Petitioner Pinto's brief complains about the Trial Judge saying as follows:

"In this instance, the mere momentary presence of oil in the area does not in and of itself render the vessel unseaworthy." Charge of the Court, p. 18.

May it be said that the Trial Judge, being mindful of the ruling in the case of *Pennant v. United States*, (2nd Cir., 225 F. 2d 708), attempted to bring his charge within the purview of the ruling of the Second Circuit Court of Appeals.

After the trial of the Pinto case, this court in the case of *Mitchell v. Trawler Racer, Inc.*, 362 U. S. [illegible], stated, in substance, in the opinion as follows: "An accident-free" vessel is not required. "Absolute perfection" is not required under the "standard of seaworthiness."

It might be said that the Trial Judge, anticipating the reasonableness of the position to be taken by this court in the *Mitchell v. Trawler Racer, Inc.* case, stated that if a vessel was as fit for service as similar vessels in similar [illegible] it does not become unseaworthy by reason of a temporary condition caused by a transient substance. In this connection respondent urges that the jury were to understand that if the vessel was a reasonably fit place for the crew members to work, it was a seaworthy vessel.

Let our minds go back to the courtroom on the day of the rendition of verdict. The jury, composed of males and females, to say the least, were inexpert in the ways of engine rooms. They heard testimony that the engine room steps were constructed in such a manner as to prevent accumulation of oil thereon. They had an opportunity to take the replica of the step in their hands and examine it closely and observe the perpendicular strips of narrow metal of which the step was constructed.

They heard testimony that the steps was cleaned a few hours before the incident; that there was a special design of the steps of the ladder to prevent an accumulation of foreign substances; that there was a safety practice of cleaning the steps; and that there was absence of oil or grease on the steps shortly before the occurrence.

Question: Was the jury conscious of the one important omission? There was no evidence by the plaintiff as to when the grease alleged to have been on the step had gotten there. Neither the plaintiff nor his co-worker could enlighten the jury as to these important and requisite facts to be proved as part of plaintiff's case.

Was it an error for the Court to tell the jury that a momentary condition would not impose liability automatically? The jury were told that they were to take the duration of the condition and the feasibility of more complete prevention into whatever account it found appropriate. Realistically, the jury was told that it was not necessary to have a member of the crew with a rag to wipe off oil every minute if it alighted on the step. Respondent urges that such a discussion is just plain common sense and it is ex-

protect that the jurors will remain free from improper influences. [illegible] in the best interest in their solicitude.

All in all, the charge is a fair statement of the jury's [illegible] duty to render an impartial verdict. Moreover, all they told them was their [illegible] and whether or not to convict. They were told in substance that they were [illegible] the province of finding an accurate statement of [illegible] they "must" or "might" find the defendant guilty. About two months after Judge Weinfeld charged the jury, this Court held [illegible] the [illegible] "all accounts from" verdict is not mandatory. [illegible] "absolute performance" is not required since the [illegible] "substantial performance." The trial judge was charged. He stated that the doctrine of substantial performance [illegible]

Conclusion

There is no need for examination of [illegible] by the United States Supreme Court as [illegible] claim. Respondent prays that the application for a writ of certiorari be denied and that it [illegible] may be terminated.

Respectfully submitted,

Gordon B. Dinsmore

Counsel for Respondent

Seven Marine Corporation of Delaware

Office & P. O. Address:

52 Broad Street

New York 5, New York

APPENDIX

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and sixty-one.

Present: HON. EDWARD J. LUMBARD,
Chief Judge.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Exhibit A

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of Said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Exhibit B

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present: Hon. Edward J. Lumbard,
Chief Judge.

Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Circuit Judges.

Raul Pinto,
Plaintiff-Appellant.

v.

States Marine Corporation of Delaware,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the Appellant,

Upon consideration thereof, it is

Ordered that the said petition be and hereby is denied.

A. Daniel Fusaro,
Clerk.

Exhibit C

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present: Hon. Edward J. Lumbard,
Chief Judge.

Hon. Charles E. Clark,
Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Hon. Irving R. Kaufman,
Hon. Paul R. Hayes,
Hon. Thurgood Marshall,
Circuit Judges.

Raul Pinto,
Plaintiff-Appellant,

v.

States Marine Corporation of Delaware,
Defendant-Appellee.

A petition for a rehearing in banc having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

Ordered that the said petition be and hereby is denied.

A. Daniel Fusaro,
Clerk.

Exhibit D

Discussion of Cases Wherein the Second Circuit Court of Appeals and District Judges of the United States District Court for the Southern District of New York Have Not Completely Nullified the Rights of Petitioner Pinto and Other Seamen.

See Appellate Court's decision in 1955 *Dixon* v. *United States*, 219 F. 2d 10. At that time Circuit Judge Harlan, now Justice Harlan of this court, succinctly enunciated the shipowner's duty to furnish a seaman with a safe place in which to work. Dixon's rights were not put in jeopardy of "complete nullification."

Circuit Judge Frank in a concurring decision in *Poignant* v. *United States*, (2nd Cir.), 225 F. 2d 595, failed to measure up to the image which petitioner Pinto's counsel is attempting to create of a judge completely nullifying and putting in jeopardy all seamen's rights.

Last year (1961) Circuit Court Judge Medina failed to put in jeopardy of complete nullification rights of seamen in *Blier* v. *United States Lines Company*, 288 F. 2d 920. United States District Judge Dimock charged the jury. This able district judge charged with respect to "transitory unseaworthiness." The rights of Blier were not nullified by the District Court or by the Second Circuit Court of Appeals, which is now criticized. Anyhow, this court denied Blier's application for a writ of certiorari.

Exhibit D

Unfortunately, the invective is insinuated with respect to the judges of the Southern District of New York, for Mr. Friedman seems to indicate in the conclusion of his brief that seamen and longshoremen and particularly Pinto, Hooper, Ezekiel and Richter will lose rights by complete nullification.

In this connection, consideration should be given to the fact that several times seamen's rights have not been nullified by the district judges.

Petitioner Pinto cites with approval Judge Dawson holding Tidewater Associated Oil Company liable in the Campbell case, 141 F. Supp. 431.

And, again, United States District Judge Weinfeld's ruling in *Buck v. United States*, 122 F. Supp. 25, aff'd. 222 F. 2d 165, is applauded by Pinto. There the question of "breach of warranty" of seaworthiness was involved.

Exhibit E

Testimony Proving That the Step Involved in the Case Was Not "Worn and Slick"

Direct examination of Frank B. Tymeson

By [illegible]

By Mr. Dunham:

Q. Well, what can you say as to the condition of those steps? Were they worn off or were they in regular condition or good order, whatever you want to call it? A. I have found the ladder in good order, and I might add that the reason that probably accounts for it being in good order is because the vessel had not been kept constantly in operation like the other Victory ships have, and the physical characteristics of the steel about the vessel had been in good condition, especially the ladders down below. There is no sign of wear at all.

Q. No sign of wear? A. No, sir.

Q. Now, tell me, I think you mentioned this was a Victory; is that a Government ship, that owned by States Marine, do you recall? A. Yes, sir.

Q. And you say it had not been used much, the ship? A. I understand the vessel had been laid up for some time and then taken out and assigned for operation to the States Marine Lines.

Exhibit E

(Cross-examination of Frank B. Tymoske by Mr. Rassner.)

(R. 467)

Q. To be quite specific, are the ladders constantly cleaned? A. They are; to the best of my knowledge.

Q. And they are constantly cleaned because there they constantly have an accumulation of grease or oil on it? A. No; in this particular case, no, because there can't be any accumulation due to the structure of the ladder. If there is anything at all on the ladder it would fall in between onto the floor plate or into the engine room.

Q. So that is it your testimony that the ladder (468) is constantly cleaned or that the ladder is not constantly cleaned? A. The ladder is constantly clean.

Q. And is it constantly cleaned of an accumulation of grease or oil or dirt? A. There can't be any accumulation on the ladder for the simple reason there is no solid surface for it to cling to.

(R. 475-481)

(By Mr. Dunham:)

Q. Well, what can you say as to the condition of those steps? Were they worn off or were they in regular condition or good order, whatever you want to call it? A. I have found the ladder in good order, and I might add that the reason that probably accounts for it being in good order is because the vessel had not (R. 480) been con-

stantly in operation like the other Victory ships have, and the physical characteristics of the steel about the vessel had been in good condition, especially the ladders down below. There is no sign of wear at all.

Q. No sign of wear? A. No, sir.

Q. Now, tell me, I think you mentioned this was a Victory; is that a Government ship chartered by States Marine, do you recall? A. Yes, sir.

Q. And you say it had not been used much, the ship? A. I understand the vessel had been laid up for some time and then taken out and assigned for operation to the States Marine Lines.